IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ——.

RALPH W. WHITE, Administrator of the Estate of Mary Vieux Bruno, deceased; JOHN A. BRUNO, ETHEL BRUNO SHOPWETUCK, MARY BRUNO WEBB, OSE BRUNO DELONAIS, NORA BRUNO KEMOHAH, JOHN A. BRUNO, JR., and EVELINE BRUNO CODY, *Petitioners*,

v.

SINCLAIR PRAIRIE OIL COMPANY, a corporation; THE PRAIRIE OIL AND GAS COMPANY, a corporation; MID-KANSAS OIL AND GAS COMPANY, a corporation, and the OHIO OIL COMPANY, a corporation, *Respondents*.

PETITIONERS' BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

There was no formal opinion of the United States District Court for the Northern District of Oklahoma. However, the judgment consists of more than three printed pages which are set forth on pages 118-121 of the Transcript. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit Court was rendered on November 16, 1943, and rehearing denied on January 3, 1944. It is reported in 139 Fed. (2d) 103.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petition to which this brief is attached sufficiently states the grounds on which the jurisdiction of this Court is invoked.

STATEMENT OF THE CASE.

Petition to which this brief is attached sufficiently states all the facts that are material to a consideration of the questions presented.

SPECIFICATION OF ERRORS ASSIGNED.

The trial court and the United States Circuit Court of Appeals for the Tenth Circuit erred in ruling that a contract of compromise and settlement with respect to the matter of forbearing from filing suit to collect Indian oil land royalties could be invalidated by subsequent litigation determining that the claimants of the royalties had no right, title or interest in the lands in question.

SUMMARY OF ARGUMENT.

1. A contract of compromise and settlement, having as its consideration an agreement to forbear from filing suit affecting the title to Indian oil lands and for the recovery of royalties therefrom, may not be invalidated by litigation initiated approximately five years later resulting in findings that the claimants as to the royalties had no title or interest in the oil lands in question.

2. The question of title was removed as an issue by the contract of compromise.

3. Subsequent litigation on the part of the United States, designed among other things to quiet title in oil lands, could have no bearing on the prior contracts of compromise and settlement.

4. Reservations in the contract of compromise and settlement and the ratification thereof retained the right to royalties in the claimants thereto.

5. A suit to quiet title could not be res adjudicata as to a contract of settlement and compromise.

ARGUMENT.

The Courts below entirely overlooked and disregarded the exceptions and reservations contained in the compromise and settlement contract and ratification. The Circuit Court of Appeals said with respect to the petitioners:

> "It placed them in the position of the original lessors under the leases. Such ratification embraced the leases in their entirety, including the provision that if the lessor owns less than an entire undivided fee simple estate he shall receive royalty only in the proportion which his interest bears to the entire fee."

But these exceptions and reservations are there in the very language of the contract. We very respectfully submit that these are particularly controlling when interpreted in accordance with Oklahoma law.

Indeed, the trial court in rendering its judgment twice proceeds to find that the petitioners made reservations with respect to royalties both in the original contract and the ratification thereof (Tr. 118-120).

There is no occasion for the use in the contract (Exhibit C) of this language:

> "so that the Brunos or either of them will have no further claim of any kind or character, *except as to royalty* to be paid under said leases as against said companies, or either of them after the execution hereof." (Italics supplied.)

and there is no occasion whatsoever for the use in the ratification instrument of the language:

> "* * * except as to royalties to be paid under said lease, which royalties amounting to one-eighth of the oil produced from said lease the said John A. Bruno and Mary Bruno expressly reserve unto themselves, their heirs and assigns"

unless payment of a separate royalty to the Brunos in oil or money in the amount specified was intended by the contracting oil companies.

Indeed, what occasion could there have been for references to the Brunos' interest in royalties in either instrument unless an explicit commitment was contemplated in the original contract and definitely in the ratification?

It is of the very greatest significance that in March, 1928, some months before any drilling was commenced on the land in question, Mary Bruno filed of record her Government trust patent. This significant fact, not even mentioned by the Circuit Court of Appeals, provides the reason for the oil Companies being willing to enter into the contract and ratification in question. The filing of this patent served to create a cloud on a very valuable leasehold. At the time the original contract was executed, four wells were producing 7,007 barrels of oil per day. The Oil Companies obviously desired to fully develop their leases, and by December 28 had fully developed their leases by the drilling of four additional wells with total flush production of 12,279 barrels per day, and they wanted no impairment of the valuable rights they were enjoying and probably considered the commitment of royalties to the Brunos cheap insurance as against the possibility of great losses.

The Circuit Court of Appeals bottoms its conclusion on the finding that:

> "ratification embraces the leases in their entirety, including the provision that if the lessor owns less than an entire undivided fee simple estate, he shall receive royalties only in the proportion which his interest bears to the entire fee."

This view of the case not only ignores the specific reservations cited but would call for a construction of the instruments that would cause the petitioners to forbear from litigation that conceivably might net them millions for a consideration totaling only $8,000.

The construction placed on these instruments by the trial and appellate courts is tortured in the greatest respect. It ignores the plain language of the contracts providing for royalties. Indeed, the appellate court seeks to rewrite the instruments, suggesting that if supplementary royalties were to be paid the Brunos that something regarding an overriding royalty should have been written into the contract.

Any reasonable construction of these contracts will make it clear that reservation and exception along the lines hereinbefore described were intended by the contracting parties.

In the case of *Dunlap* v. *Jackson*, 92 Okla. 246, 218 Pac. 314, the Oklahoma Supreme Court quoted with approval the following language from *Stone* v. *Stone*, 141 Iowa, 438, 119 N. W. 712:

> "A reservation is never part of the estate itself, but is something taken back out of that *already* granted, as rent, or right to cut timber, or the right to do something in relation to the estate."

The court after reveiwing a number of authorities concluded as following:

> "Counsel for all parties have ably briefed the case, and have been of great assistance to the court in arriving at a decision, and after a patient review of the authorities and an examination of the record, and of the reservation in the various deeds, we have reached the conclusion that the reservations made in the deeds from Engles to the Bruners and from the Bruners to the Engles, and which were perpetuated and carried into the deed from the Engles to Dunlap and from the Bruners to the plaintiff, Pearl P. Jackson, under the authorities cited herein, are valid reservations,

> and that upon the discovery and production of oil on the quarter section involved, the defendant Dunlap, and plaintiff, Pearl B. Jackson, are entitled to take the royalty from the production of oil and gas from said quarter section in the proportion as provided in the reservations in their respective deeds. Having reached this conclusion we hold that the court below erred in entering judgment on the pleadings in favor of the plaintiff, Pearl B. Jackson, for the entire royalty from the '40 acres' owned by her, and for that error the case is reversed and remanded to the trial court, with directions to set aside the judgment and proceed with this case according to the views herein expressed."

These instruments were drawn in Oklahoma; they related to Indian residents of Oklahoma; they dealt with the interest of petitioners as to royalties in Indian oil lands situated in Oklahoma, and were to be performed in Oklahoma. Hence, the foregoing holdings of the Court of last resort of Oklahoma is particularly controlling in view of the doctrine enunciated by this Honorable Court in *Erie Railroad* v. *Tompkins,* 302 U. S. 671; 82 L. Ed. 518.

The matter of forbearance in filing suit is not only approved as being adequate consideration, but in reality is favored by the courts. Citation of authority other than *Kiefer Oil and Gas Company* v. *McDougal,* 229 F. 933-939 hardly is required. The proposition is elementary.

The Kiefer case held at p. 939:

> "And it is held quite uniformly that, where the parties are mistaken as to the law, they are nevertheless bound by the contract of compromise. Prout v. Pittsfield Fire District, 154 Mass. 450, 28 N. E. 679; Fidelity & Casualty Company v. Gillette Hezoz Company, 92 Minn. 274, 99 N. W. 1123; City Electric Railway Company v. Floyd County, 115 Ga. 655, 42 S. E. 45; Lewis v. Cooper, Cooke (Tenn.) 467; Connor v. Ethridge, 3 Neb. (Unof.) 555, 92 N. W. 135; 5 Ruling Case Law, 898.
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> "There is no question of fraudulent representation of the facts. Both parties understood the elementary

facts fully, but it is claimed that, as they did not understand the law as it was ultimately determined to be, this lead to a mutual mistake as to the ultimate fact of ownership; but this was one of the very matters in dispute at the negotiations. The representative of the Oil and Gas Company claimed at the time that they had a good title, and Mr. McDougal in substance said the courts must determine that. Then they compromised, and Mr. McDougal surrendered $20,000 of his bonus offered him by Shulthis and agreed to lose the remaining $5,000 if the Kiefer Oil and Gas Company, did not win its suit with Shulthis for an increased royalty, and agreed to turn the management of the litigation over to the Kiefer Oil and Gas Company. They took charge of the litigation and stood upon their rights under the lease and contract with McDougal as a defense, won their suit substantially on these alleged rights in the District Court, and now want to repudiate the contract because they ultimately won their case on other grounds in this court. This, under the facts shown here, they cannot do. The District Court was right in ordering that the sum in the hands of the receiver of $41,913.44 he paid to Mr. McDougal. The decree of the district court is affirmed."

The Circuit Court of Appeals as well as the trial court overlooked the fact that the contract sued on is not an oil and gas lease and that it contains no "lesser interest clause". The reservations, indeed, would be in direct conflict with any theory of the application of the "lesser interest" clause.

Little argument is required to support the proposition that the original contract of 1928 and the ratification of 1930 are to be considered as one instrument, in view of the specific terms of the original contract requiring a ratification and an approval on the part of the Secretary of the Interior.

The Circuit Court of Appeals calls attention to the fact that the ratification of the contract, containing the reservation of one-eighth royalties to the Brunos, their heirs

and assigns, was not signed by the Oil Companies. But the Court overlooked the fact that the contract sued on taken as a whole and construed as a whole is a *grant*, a conveyance and an acquittance which required only the signature of the grantors. It is true that both the Oil Companies and the grantors signed the initial contract of 1928. But the supplementary ratification by the terms of 1928 contract required the signatures of only the Brunos as grantors. Further, the conveyance and acquittance signed by the Brunos as grantors became binding on the grantees when accepted. After the ratification had been approved by the Secretary of the Interior, on March 2, 1930, the Oil Companies paid the balance of $6,000.00 as required by the contract and proceeded under the terms of the original leases and the contract and ratification of the Brunos to withdraw several million barrels of oil from the tract in question. The signing on the part of the Oil Companies was not contemplated by the earlier instrument. Their acceptance of the benefits constituted a complete ratification of the supplementary instrument. Further, there is nothing in the ratification of 1930 that in any wise tends to alter or to modify the provisions of the 1928 contract.

In the last analysis, the ratification must be construed as a document bearing the approval of the Secretary of the Interior which the Oil Companies felt they should have in order to insure the binding effect of the 1928 contract. It was for the Companies' benefit and for their benefit alone.

Of interest at this stage is a local statute of Oklahoma, Section 9668, Oklahoma Statutes, 1931; 16 Oklahoma Statutes, 1941, Sec. 11:

> "Any person or corporation having knowingly received and accepted the benefits of any part thereof of any conveyance mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud * * *"

If there is any suggestion on the part of respondents in this case that there is occasion here for the application of the doctrine of laches, attention respectfully is called to *United States* v. *Dunn*, 268 U. S. 121, holding that one who claims the benefit derived from a breach of trust in which he actively participates and who shows no prejudice resulting from the delay in bringing suit to compel him to account, cannot complain of laches.

The Tenth Circuit Court of Appeals erred in applying the doctrine of res judicata and in holding that *United States* v. *Getzelman*, 89 Fed. 2d, 531—actually initiated approximately five years after the execution of the original contract—adjudicated the matters sought to be litigated in the case at bar. The following reasons are called to the attention of this Honorable Court:

a. The Getzelman case was a proceeding to quiet title in land. The case at bar is an action to recover oil royalties by virtue of an express contract between petitioners and the oil companies at bar.

b. The parties were not the same, nor substantially the same. The United States was the sole party plaintiff, although suing as legal owner to the land in which Mary had a beneficial interest. The defendants, some twenty-six in number, were claimants, other than the Brunos, to title in the land, claimants to oil leases in the land, and claimants by virtue of purchase or assignment to royalty interests in the land.

c. The subject-matter, as hereinbefore noted, was not the same. The relief sought was not the same.

d. Recovery by petitioners herein of all they claim will overturn and undue no title or claim of title, but merely allow to them the benefits of a contract for the recovery of oil royalties.

e. The capacity of the plaintiff, United States, in the Getzelman case, and the capacity of the appellants in the

case at bar with respect to things sued for are not identical, nor substantially the same. The appellants would not have had the capacity to maintain a suit to quiet legal title in the United States or restore to it its trust rights and obligations. Nor could the United States maintain an action to recover royalties on the contract sued on for the benefit of the petitioners, or otherwise, because there is, under the contract, no trust or restricted Indian property involved. (*Johnson* v. *Whalen*, 186 Okla. 511, 98 P. (2) 1103.

f. *Bruno* v. *Getzelman*, 70 Okla. 143, 173 P. 850, relied on in part by the trial court cannot be res judicata as to any matter arising under the contract sued on because it was decided more than ten years before the execution of the contract.

g. Finally, it is well to consider the precise requirements of the Oklahoma Supreme Court in the matter of application of the doctrine of res judicata:

> "In order to make a matter res judicata, there must be concurrence of four conditions following: (a) identity in the thing sued for or subject matter of the action; (b) identity of the cause of action; (c) identity of the persons or parties in action; and (d) identity of the capacity in the person for or against whom the claim is made." Johnson v. Whalen, et al. 186 Okla. 511, 98 Pac. (2d) 1103.

As to the suggestion of the 10th Circuit Court of Appeals that the case at bar amounts merely to a piecemeal presentation of the issues that were determined in the Getzelman case, supra, it is respectfully submitted that on the basis of the foregoing reasons cited, there was no identity, even of the vaguest kind, between the suit of the U. S. to quiet title in the Getzelman case and the present action of the petitioners to recover oil royalties provided for under explicit contract.

Petitioners respectfully submit that the views enunciated by the 10th Circuit would do irreparable harm and injury

to the wholesome doctrine affecting the settlement of projected litigation by compromise in that any prospective litigant settling out of court might very well have his position jeopardized and his consideration wrongfully taken from him by litigation initiated long subsequent thereto. It will be remembered that the Getzelman case on which the 10th Circuit Court of Appeals depends in order to deny the petitioners their recovery to oil royalties in the case at bar was filed some five years after the contract was signed and not settled definitely until refusal of this Honorable Court to grant certiorari, 302 U. S. 708, 82, L. Ed. 547 on October 11, 1937, or nine years thereafter.

CONCLUSION.

Wherefore, the premises considered, it is respectfully submitted that the decision below clearly was in error and should be reviewed by this Court. Accordingly, the writ prayed for should issue.

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